Simon v. Adzilla, Inc [New Media] et al
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EXHIBIT FF

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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CIVIL ACTION NO. 04-11923-DPW

CONNECTU LLC
Plaintiff

V.

MARK ZUCKERBERG, et al
Defendants

BOSTON, MASSACHUSETTS
JUNE 22, 2006

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ROBERT B. COLLINGS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:

Jonathan Gelchinsky, Esquire
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
55 Cambridge Parkway
Cambridge, MA 02142
(617) 452-1600

John F. Hornick, Esquire
Margaret A. Esquenet, Esquire
Finnegan, Henderson, Farabow, Garrett & Dunner, LLP
901 New York Avenue, N.W.
Washington, DC 20001
(202) 408-4000

For the Defendants:

G. Hopkins Guy, III, Esquire
I. Neel Chatterjee, Esquire
Monte cooper, Esquire
Orrick, Herrington & Sutcliffe LLP
1000 March Road
Menlo Park, CA 94025
(650) 614-7400

Court Reporter:

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oral agreement in existence on that date.

THE COURT: But his point is that when you have a written, later written agreement that contains an integration clause, you can't rely on any of the prior oral agreements.

MR. HORNICK: Well, Your Honor, I don't think that's the law, and I'll get into that in a moment, but it doesn't make any sense. If there's an oral agreement between two parties that exist for say a five year period of time, and then a written agreement comes along later and it operates into the future and it even operates retroactively, although you might be able to apply it retroactively for certain purposes, the fact is that an oral agreement still existed between those parties for a particular period of time. Under the law, the parol evidence rule is not applicable to a collateral agreement, and this was a collateral agreement. It was not the same.

THE COURT: Why do you say collateral? If it covers the same subject matter that's in the later agreement that's written with an integration clause, how could it be said to be collateral?

MR. HORNICK: It didn't cover the same information. The operating agreement, the written operating agreement that came in August of 2005, was a very complex document that covered a lot of issues. The oral agreement that existed in, that existed from the time that ConnectU was formed up until the time that they signed a written agreement, which was almost a year and a half later, was an oral agreement that was much simpler. It was all that was needed to--

THE COURT: Yeah, but they, the point is that the written agreement, it might have covered a lot more, it might have been a lot more complex, but it did cover the same subject matter as the oral agreement, which is the point the defendants are making.

MR. HORNICK: It covered that issue, that's right, Your Honor, but if you were looking at the state of facts, the state of facts on September 2nd of 2004, you cannot say that there was a later agreement because you can only look at what the state of facts were on that date and on that date there was no August 5th, 2005 agreement. It's logically impossible. So if the Court is going to--

THE COURT: No, it's more a question of what you're permitted to prove. Let me ask you this. Have you responded to the integration argument?

MR. HORNICK: No, Your Honor, it was just submitted to the Court yesterday, I believe it was yesterday, and with respect to the interrogatory answer that was made in California, first of all, Mr. Narendra is no longer a party in that case.

THE COURT: It doesn't matter. It's a statement made under oath. It's evidence. I was asking offer of proof of what the evidence is. That would clearly be admissible.

MR. HORNICK: ConnectU, which is still in that case, and ConnectU was the one that had members, filed an amended interrogatory response in that case to clarify the answer and makes it clear that Mr. Narendra is not--

THE COURT: It doesn't supersede what Mr. Narendra's answer is. If he in fact signed that interrogatory under the pains and penalty of perjury, that is evidence. The fact that ConnectU tried to amend it or did amend it, may have some bearing on that litigation, but it doesn't have any bearing on the fact that the statement was made under oath and it's evidence, evidence on the question.

I think what I would like to do is to give you the opportunity to respond to the integration - let me just ask the defendant, is this integration argument the only argument that you say defeats them as a matter of law on this subject of Mr. Narendra being a member or not as of September 2nd?

MR. CHATTERJEE: No, Your Honor, there is a second issue. I think there are three issues that are matters of law. The first one is the parol evidence issue.

THE COURT: The integration agreement?

MR. CHATTERJEE: The integration clause. I'll call it the integration clause.

THE COURT: Let's call it the integration issue.

MR. CHATTERJEE: The second is given Mr. Narendra's binding statement that he made and the fact that he made it to support a Motion to Dismiss that he prevailed upon, he cannot recant that statement and say that he meant something different.

THE COURT: So is it some sort of judicial estoppel?

MR. CHATTERJEE: It's judicial estoppel and there's also case law we've cited in our Motion to Strike saying he can't change the sworn testimony that he's given. It says what it says.

THE COURT: Okay. That's the sworn testimony argument, and what's the third?

MR. CHATTERJEE: And the third one, Your Honor, is we have put in our Motion to Strike, and this was something that came up, that came to life because of this issue is that ConnectU had not registered as a foreign LLC in the state of, in the state of Massachusetts and in order in diversity actions for plaintiff to proceed on their claim in federal court, they have to have registered in the state of Massachusetts as a foreign LLC first. They have not done that. They still have not done that and they in fact cannot do it at this point because the LLC has failed to exist and that is a prerequisite to standing.

THE COURT: All right. Thank you. What I'm going to do is give you, Mr. Hornick, an opportunity to respond to those three legal arguments in a brief. We'll take a look at it and

CERTIFICATION

I, Maryann V. Young, court approved transcriber, certify that the foregoing is a correct transcript from the official digital sound recording of the proceedings in the above-entitled matter.

Maryann V. Young

July 3, 2006